

**REPORTS OF INTERNATIONAL
ARBITRAL AWARDS**

**RECUEIL DES SENTENCES
ARBITRALES**

Anglo-Japanese Property Commission established pursuant to the Agreement
concluded between the Allied Powers and the Government of Japan on 12 June 1952

**Decision of 30 November 1960 in the case
United Kingdom *in re* Struthers and others v. Japan**

Commission anglo-japonaise des biens, établie en vertu de l'Accord
conclu entre les Puissances Alliées et le gouvernement du Japon le 12 juin 1952

**Décision du 30 novembre 1960 dans
l'affaire Royaume-Uni *in re* Struthers et al. c. Japon**

30 November 1960

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PART XXIII

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ANGLO-JAPANESE PROPERTY COMMISSION ESTABLISHED
PURSUANT TO THE AGREEMENT CONCLUDED BETWEEN
THE ALLIED POWERS AND THE GOVERNMENT OF JAPAN ON
12 JUNE 1952

COMMISSION ANGLO-JAPONAISE DES BIENS, ÉTABLIE EN VERTU
DE L'ACCORD CONCLU ENTRE LES PUISSANCES ALLIÉES ET LE
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Treaty of peace between the United Kingdom and Japan of 1951—treaty interpretation—intention of the parties—meaning of “property”—inability of States to restrict treaty obligations through national law.

Arbitral proceeding—principle of *stare decisis* following from judicial comity and desirability of certainty and consistency in the interpretation of treaties—freedom to reach a different conclusion than other commissions in case of error.

War damages—assessment of compensation—compensation for loss.

Traité de paix entre le Royaume-Uni et le Japon de 1951—interprétation des traités—intention des parties—signification de la notion de “biens”—impossibilité pour un État de restreindre ses obligations conventionnelles par son droit national.

Procédure d'arbitrage—principe du *stare decisis* découlant de la courtoisie judiciaire et du désir de certitude et de constance dans l'interprétation des traités—faculté de parvenir à une conclusion différente de celles adoptées par les autres commissions en cas d'erreur.

Dommages de guerre—estimation des dédommagements—compensation des pertes.

* Reproduced from *International Law Reports* 29 (1966), p. 389.

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The claims relate to the interests of Allied Nationals as shareholders in Japanese companies and are made under Article 15 (a) of the Peace Treaty and the Compensation Law mentioned therein. The Commission decided to consider all four cases together since the same issues of law are involved in each, and the pleadings incorporate the General Reply and General Counter Reply, dealing with the same issues and filed by the two Governments concerned in the minority shareholders cases before the United States-Japanese Property Commission.

The Agents for the British and Japanese Governments then presented to this Commission a statement of the issues arising in these four cases, together with certain arguments additional to those appearing in the pleadings. On November 22, 1960, the Commission indicated to the Agents the opinions which, subject to further consideration, it was disposed to formulate on these issues.

The Agents then presented figures based upon their application of the views expressed by the Commission on the material available to them. The figures brought into sharper relief the measure of discrepancy between the information supplied to the Japanese Government by some of the companies concerned and that given to the United Kingdom Government by these companies.

After stating the facts, the Commission gave their original views on the issues arising:

The views thus expressed included the following statements.

A. *Interpretation of the meaning of property in Japan at the beginning of the War as used in the Compensation Law, so as to determine whether the conception of inventory as a separate entity should be recognized*

The issue has already been considered by the United States-Japanese Commission which has given a considered determination of the point in its decision No. 4, dealing with some ten claims then pending before it. In that decision the U.S.-Japanese Commission concluded that the commercial concept of inventory as a separate, albeit continually changing, entity should be recognized and that the Government of Japan is responsible for damage to inventory, not exceeding in value the inventory on hand at the commencement of the war, even though the items constituting the inventory at the time of their destruction were not the precise items that were in existence at the beginning of the war.

This decision was given on the Treaty and the Law now before us, after a very full and thorough consideration of the factors involved. We are, of course, not bound by that decision and are quite free to reach a different conclusion if we think that the U.S.-Japanese Commission was in error, but judicial comity and the desirability of certainty and consistency in the interpretation of treaties and the Law, which has led to the establishment of the principle of *stare decisis* in so many countries, clearly indicate that we should not take a different course unless we have strong and cogent reasons for dissenting from the view of the Commission which has just completed its work. Having carefully considered the arguments put before us and whilst acknowledging the

force and weight of much of the argument advanced by the Japanese Agent, we, nevertheless, do not find sufficient reason to differ from the view taken by the U.S.-Japanese Commission and we, also, have reached the conclusion that the concept of "inventory", which plays so important a role in commercial activities, particularly in regard to matters such as insurance, mortgages, etc., should be recognized in the interpretation of the Peace Treaty and the Compensation Law, Law No. 264 of 1951.

We do not think we can accept the further contention of the Japanese Agent that where the inventory remaining after war damage exceeded that of 1941 there would be no damage to the 1941 inventory capable of attracting compensation. In our view, where damage had occurred but the inventory had been kept up to strength or increased by other additions, that damage would, nevertheless, be capable of attracting compensation.

It is not the maintenance of value that provides the continuity in this instance but the quality of belonging to a particular category of a company's assets, a category which continues to exist as a whole though the identity of individual items in it may change. This category can suffer injury just as a man or a house may suffer injury requiring reparation and survive. The fact that reparation has been made from other resources does not mean that the injury did not occur.

B. Interpretation of Article 12 (3) of the Compensation Law

It appears that the intention of Article 12 (3) was to take into account and deduct from the compensation payable the net increase in value of additional items of property acquired by the company after the commencement of the war. Whilst we do not think that these should properly include items which merely replace those that were worn out, discarded or otherwise disposed of for reasons unconnected with war damage, it seems reasonable to conclude that, where claims are being made in respect of war damage to articles which have been replaced, the profits accruing from the enhanced value of articles replacing war damaged articles should be taken into account in the calculation of that damage.

C. Subsidiary issues

(1) Having regard to the provisions of Article 5 and Article 16 of the Compensation Law, we are disposed to take the view that, in determining the deduction under Article 12 (3), the basis for calculation is the time prescribed for restoration under the Treaty or the date of coming into force of the Treaty, whichever is the later, and that the figure so reached must be multiplied by the proper magnification factor.

(2) In dealing with fixed assets, the value of materials, expenses for engineering and architect's fees, and advance payments to contractors should be included among the fixed assets in existence at the beginning of the war only to the extent to which they were, at that time, reflected in physical structures or constructive work physically undertaken.

(3) To apply the rates of depreciation indicated in the Ministry of Finance Ordinance No. 50 of May 31, 1951, an Ordinance dealing with the Durable Years of Fixed Assets, merely because they appear in that Ordinance would be a breach of the recognized principle that a Government cannot properly restrict or control, by its own domestic law, the obligations which it has undertaken in an international treaty. The depreciation rates applied to fixed assets should, in each case, be reasonable and, in our view, the rates adopted by the companies themselves at the relevant times should be followed unless there are good and cogent reasons for departing from those rates. No such reasons appear to exist in the present cases.

(4) The magnification factors should, we think, be based on the appropriate category in the economic statistics tables published by the Bank of Japan. When no more specific category is relevant we think the general wholesale category should be used.

(5) As already indicated in other cases, we do not think that the term "other measures of the Japanese Government and its agencies", used in Item (2) of the first, paragraph of Article 4 of the Compensation Law, is limited to measures "toward the enemy", but includes measures taken for the purpose of mobilizing the Japanese resources for the more effective prosecution of the war or disposing of those resources in a manner dictated by the necessities of war, as, for example, the demolition or removal of buildings for the purposes of air defence.

(6) In determining the acquisition cost under Article 12 (3) of the Compensation Law we think that the proper cost to be deducted is the original cost itself, and not the cost, reduced by a factor designed to bring it down to the equivalent of the remaining value of the property as at the time of destruction.

(7) In calculating the damage to fixed assets we think the depreciation should be calculated up to the time of the commencement of the war.

Thereafter the Agents presented us with figures based on their application of the views just expressed to the material available to them. These figures brought into sharper relief the measure of discrepancy between the information supplied to the Japanese Government by some of the companies concerned and that given to the British Government by these companies.

In pursuance of Article 16 (2) of the Commission's Rules of Procedure we then entered into discussions with the Agents as to the appropriate compensation in each case.

Having, thereafter, given further consideration to the views expressed on November 22, the conclusion has been reached that these views should be modified in two respects.

(1) By including in the amount to be deducted under Article 12 (3) the profits that accrued from items replacing those which had suffered war damage the Commission would, so far as the Allied shareholders are concerned, be

asking the companies concerned to meet the cost of war damage from profits which would carry no such burden when accruing to companies that had suffered no war damage. On further reflection, it seems to a majority of the Commission that this would be incompatible with the general purposes of a Law intended to provide compensation for war damage. It has accordingly been decided that such profits will not be deducted.

(2) The view adumbrated on subsidiary issue C (1) should be modified by omitting the reference to the time prescribed for restoration under the Treaty. The basis for calculation should in all cases be the date of coming into force of the Treaty, but it is understood that this modification makes no material difference to the figures presented to the Commission.

Bearing in mind the first of these modifications as well as the discrepancy to which reference has already been made, and having regard to the discussions with the Agents, the Commission has decided that compensation should be paid to the claimants as follows:

Mrs. Struthers	¥ 69,000
Brigadier J. O. E. Vandeleur	¥ 280,000
The Executors of John Duncan Fraser	¥ 3,800,000
The Union Insurance Society of Canton	¥ 4,730,000

This Decision is definitive and binding, and its execution is incumbent on the Government of Japan.